

U.S. Department of Labor

Office of Administrative Law Judges
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DATE: January 4, 2000

CASE NO: 1999-ERA-21

In the Matter of

**KURT R. RATHGABER,
Complainant,**

v.

**WISCONSIN ELECTRIC POWER COMPANY,
Respondent.**

RECOMMENDED DECISION AND ORDER
APPROVING SETTLEMENT AGREEMENT AND
DISMISSING COMPLAINT WITH PREJUDICE

This case arises under the Energy Reorganization Act of 1974 (the "ERA" or "Act"), as amended, 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission and their contractors and subcontractors may file "whistleblower" complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. See 42 U.S.C. § 5851(a); 29 C.F.R. Part 24.2.

On April 15, 1999, Kurt R. Rathgaber ("Complainant") filed a complaint of retaliation against Wisconsin Electric Power Company ("Respondent"). The Occupational Health and Safety Administration, U.S. Department of Labor, conducted an investigation and determined that the complaint had merit. Respondent appealed the findings and remedies proposed by George Yoksas, Area Director, of the Occupational Health and Safety Administration, as set forth in a letter dated May 27, 1999.

On June 11, 1999, this matter was assigned to the undersigned administrative law judge for hearing and adjudication. Pursuant to due notice, this matter was scheduled to be heard on October 6, 1999, in Milwaukee, Wisconsin. On September 13, 1999, counsel informed this office that the parties had reached a settlement agreement, thus obviating the need for a formal hearing. On January 4, 2000, this office received the parties' fully executed Release and Settlement Agreement ("R&SA") and Motion to Dismiss Based Upon Voluntary Settlement.

Standard of Review

The implementing regulations set forth at 29 C.F.R. Part 24 do not contain any provision relating to a dismissal of a complaint by voluntary settlement. Therefore, it is necessary to refer to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, which are controlling in the absence of a specific provision at Part 24. See 29 C.F.R. Part 18.

Part 18.9 allows the parties in a proceeding before an administrative law judge to reach agreement on their own. See 29 C.F.R. Part 18.9(a)-(c). The parties must "[n]otify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action." 29 C.F.R. Part 18.9(c)(2). Once such notification occurs, the administrative law judge shall then issue a decision within thirty days, if satisfied with the agreement's form and substance. See 29 C.F.R. Part 18.9(d). The administrative law judge must determine whether the settlement agreement is fair, adequate, and reasonable before dismissing the case. See Bonanno v. Stone and Webster Eng'g Corp., 97-ERA-22 at 1 (ARB Jun. 27, 1997). See also Biddy v. Alyeska Pipeline Serv. Co., 95-TSC-7 at 3 (ARB Aug. 1, 1996)(agreement must not contain provisions that are contrary to public policy).

I note that the parties' agreement appears to encompass the settlement of matters under laws other than the ERA. See R&SA at 2-3, para. 9. As stated in Poulous v. Ambassador Fuel Oil Co., Inc., 86-CAA-1 at 1 (Sec'y Nov. 2, 1987), the Secretary of Labor's "authority over settlement agreements is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute." Accordingly, I have limited my review of the Release and Settlement Agreement to determining whether its terms are a fair, adequate, and reasonable settlement of Complainant's allegations that Respondent violated the ERA. See Kim v. University City Science Center, 90-ERA-7 at 2 (Sec'y July 26, 1990)(limiting review of agreement to the terms pertaining to complainant's allegation that respondent violated the ERA).

Release and Settlement Agreement

Upon careful review, I find that the Release and Settlement Agreement fully comports with precedent established by the Secretary of Labor and/or the Administrative Review Board. I note that the parties have included language to the effect that nothing in the agreement shall be construed as an admission of Respondent's liability. See R&SA at 1, para. 1. This Recommended Decision and Order, however, should not be construed as indicating my view on the merits of this case.

Paragraph 12 of the agreement provides that the parties shall keep the terms of the settlement confidential, with certain specified exceptions. See R&SA at 3, para. 12. I note that the confidentiality agreement, when construed in light of the provisions set forth in paragraphs 13 and 14, does not restrict any disclosure where required by law. See R&SA at 3, paras. 13, 14. See also McGlynn v. Pulsair, Inc., 93-CAA-2 at 2 (Sec'y Jun. 28, 1993); Rondinelli v. Consolidated Edison Co. of New York, Inc., 91-CAA-3 at 2 (Sec'y Apr. 10,

1992)(interpreting confidentiality provision as not restricting disclosure of the terms of the agreement where required by law).

Paragraph 20 provides that the laws of Wisconsin shall govern this settlement agreement. See R&SA at 4, para. 20. I interpret this provision as not limiting the authority of the Secretary of Labor or any federal court under the applicable statutes and regulations. See Bonanno, 97-ERA-33 at 2 (construing state law provision as not limiting jurisdiction of federal tribunals); McGlynn, 93-CAA-2 at 2.

Moreover, the Administrative Review Board requires that all parties requesting settlement approval of cases arising under the ERA either provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or certify that no other such settlement agreements were entered into between the parties. See Biddy v. Alyeska Pipeline Serv. Co., 95-TSC-7 at 3 (ARB Dec. 3, 1996). Hence, I note that the parties have certified that this agreement constitutes the entire and only settlement agreement with respect to Complainant's ERA claim. See R&SA at 1, 4, paras. 2, 18.

Accordingly, and based on the foregoing, I hereby find the Release and Settlement Agreement, as so construed, to be a fair, adequate, and reasonable settlement of the complaint.

Recommended Order

IT IS HEREBY RECOMMENDED that the Release and Settlement Agreement between Complainant Kurt R. Rathgaber and Respondent Wisconsin Electric Power Company be **APPROVED** and that the matter be **DISMISSED WITH PREJUDICE**.

Entered this _____ day of January 2000, at Long Beach, California.

DANIEL L. STEWART

Administrative Law Judge

DLS:cdk

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8, 24.9, amended by 63 Fed. Reg. 6614 (1998).